

STATE OF INDIANA) IN THE ALLEN SUPERIOR COURT
) SS:
COUNTY OF ALLEN) CAUSE NO.

DONALD R. HENRY)
)
Plaintiff,)
)
v.)
)
THE KROGER CO.,)
)
Defendant.)

COMPLAINT

Plaintiff alleges against Defendant that:

1. Plaintiff, Donald R. Henry, filed an initial Charge of Discrimination, No. 24D-2020-00076 on or about December 18, 2019 (Exhibit A), and subsequently filed an Amended Charge of Discrimination on or about March 23, 2020 (Exhibit B), both of which are attached hereto made apart hereof and incorporated herein. The EEOC issued a Dismissal and Notice of Rights on or about October 2, 2020, a copy of which is attached as exhibit C, and this Complaint has been filed within ninety days after receipt thereof.
 2. Defendant, The Kroger Co., is a company that was Plaintiff's "employer" and is headquartered at 1014 Vine Street, Cincinnati, Ohio 45202-1100. Kroger's registered agent is Corporation Service Company 135 North Pennsylvania Street, Suite 1610, Indianapolis, Indiana 46204. Plaintiff worked at Kroger's local facility located at 1125 West State Boulevard, Fort Wayne, Indiana 46808.
 3. Plaintiff worked at Kroger as a Staff Pharmacist from about August 2001 through about December 12, 2019. Kroger was Plaintiff's "employer" for purposes of the Age

Discrimination in Employment Act of 1967, 29 U.S.C. § 621 *et seq.* (“ADEA”), the American’s With Disabilities Act of 1990, 42 U.S.C. § 12111 *et seq.* (“ADA”) as amended by the ADAA, and the Family Medical Leave Act of 1993, 29 U.S.C. § 2601 *et seq.* (“FMLA”).

4. Plaintiff contends that he was discriminated against, retaliated against, and discharged on account of his age in violation of the ADEA, for the reasons and based upon the facts, set forth in the Charge of Discrimination/Amended Charge of Discrimination, set forth as Exhibits A and B to the Complaint.
5. In 2014 Kroger management and Plaintiff had engaged in the interactive process to accommodate Plaintiff’s disability. A reasonable accommodation was put in place. The reasonable accommodation followed the issued instructions by Plaintiff’s physician. In December 2019 after the Plaintiff filed his complaint of age discrimination the Defendant unilaterally rescinded the reasonable accommodation and refused to engage in the interactive process regarding the same.
6. Plaintiff alleges that he was discriminated against, retaliated against, and discharged on the basis of disability, significant heart problems which triggers arrhythmia in which substantially interferes with Plaintiff’s ability to breathe, live, exercise, work long hours, and other daily life activities. Plaintiff attempted to engage in the interactive process with Defendant which not only failed to interact with the Plaintiff in good faith, but thereafter denied Plaintiff’s requests for reasonable accommodation, and then retaliated against the Plaintiff for making an effort to engage in the interactive process and request reasonable accommodations by denying the accommodations, and then terminating the Plaintiff out of

retaliation. Plaintiff was a qualified individual with a disability because he could perform the essential functions of his job either with or without reasonable accommodations, was perceived and regarded as being disabled by the Defendant, and had a record of impairment which caused Defendant to discriminate against Plaintiff because of his disability.

7. Plaintiff was denied substantive benefits under the FMLA in that he was not allowed to return to work after his extended leave. Plaintiff also suffered job interference and retaliation for articulating his need and for taking medical leave. Kroger stopped the reasonable accommodation in January 2020 and then punished Plaintiff for his disability and for seeking accommodations and taking medical leave.
8. The actions of the Defendant in discriminating against the Plaintiff, retaliating against the Plaintiff, and terminating the Plaintiff were all intentional and in reckless disregard of Plaintiff's federally protected civil rights under the ADEA (Age), the ADA (disability), and the FMLA (medical leave). As a result, Plaintiff suffered mental anguish, emotional distress, inconvenience, humiliation, embarrassment, a loss of his job and job-related benefits including income, and other damages and injuries.
9. Because Defendant acted intentionally and in reckless disregard of Plaintiff's federally protected civil rights, Plaintiff is entitled to punitive damages under the ADA, and liquidated damages under the ADEA and the FMLA.

WHEREFORE, Plaintiffs prays for judgment against the Defendant, for compensatory and punitive damages under the ADA, for backpay and liquidated damages under the ADEA and the FMLA, for costs of the action, including attorney's fees under the ADA/FMLA/ADEA, and for

all other just and proper relief in the premises.

JURY DEMAND

Pursuant to Rule 38 of the Indiana Rules of Trial Procedure, Plaintiffs demand a trial by jury in this action.

Respectfully submitted,

CHRISTOPHER C. MYERS & ASSOCIATES

/s/ Christopher C. Myers
Christopher C. Myers, #10043-02
809 South Calhoun Street, Suite 400
Fort Wayne, IN 46802
Telephone: (260) 424-0600
Facsimile: (260) 424-0712
E-Mail: cmyers@myers-law.com
Counsel for Plaintiff

USDC IN/ND case 1:21-cv-00006-MAB-GEO document 4 filed 12/22/20 page 5 of 8

EEOC Form 5 (11/00)

CHARGE OF DISCRIMINATION

This form is affected by the Privacy Act of 1974. See enclosed Privacy Act Statement and other information before completing this form.

Charge Presented To: Agency(es) Charge No(s):
 FEPA EO-0051-A20
 EEOC 24D-2020-00076

City of Fort Wayne Metro Human Relations Commission

and EEOC

Name (Indicate Mr., Ms., Mrs.)

Donald R. Henry

Home Phone (Incl. Area Code)

(260) 625-6152

Date of Birth

Street Address

City, State and ZIP Code

11212 Bay Pines Court, Fort Wayne, IN 46814

Named Is the Employer, Labor Organization, Employment Agency, Apprenticeship Committee, or State or Local Government Agency That I Believe Discriminated Against Me or Others. (If more than two, list under PARTICULARS below.)

Name KROGER	No. Employees, Members Unknown	Phone No. (Include Area Code) (260) 428-3453
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Street Address

City, State and ZIP Code

1125 West State Boulevard, Fort Wayne, IN 46808

Name	No. Employees, Members	Phone No. (Include Area Code)
------	------------------------	-------------------------------

Street Address

City, State and ZIP Code

DISCRIMINATION BASED ON (Check appropriate box(es).)

DATE(S) DISCRIMINATION TOOK PLACE

Earliest

Latest

05-01-2019

12-12-2019

<input type="checkbox"/> RACE	<input type="checkbox"/> COLOR	<input type="checkbox"/> SEX	<input type="checkbox"/> RELIGION	<input type="checkbox"/> NATIONAL ORIGIN
<input checked="" type="checkbox"/> RETALIATION	<input checked="" type="checkbox"/> AGE	<input type="checkbox"/> DISABILITY	<input type="checkbox"/> GENETIC INFORMATION	
<input type="checkbox"/> OTHER (Specify)				

<input checked="" type="checkbox"/> CONTINUING ACTION

THE PARTICULARS ARE (If additional paper is needed, attach extra sheet(s)):

I am a qualified individual over the age of forty (40) who has worked for Kroger since August 2001.

In May 2019, I received a "satisfactory" performance review. The review was later changed to "unsatisfactory" by the district manager, Rick Koomler ("Koomler"). I believe that Koomler changed the review because of my age, sixty four (64). In August 2019, I reported that the negative performance review was based on age discrimination. On or about December 8, 2019, I received noticed that I could either be demoted and take a pay cut, or be terminated. I believe I was forced to take a demotion in retaliation to my complaint of age discrimination.

For these reasons, I believe I have been discriminated against on the basis of my age, and retaliated against in violation of the Age Discrimination in Employment Act of 1967, as amended, and Fort Wayne Ordinance G-21-78, as amended.



JUAN GUAYAMO, Notary Public
Allen County, State of Indiana
Commission Number NP0720499

My Commission Expires May 28, 2027

I want this charge filed with both the EEOC and the State or local Agency, if any. I will advise the agencies if I change my address or phone number and I will cooperate fully with them in the processing of my charge in accordance with their procedures.

I declare under penalty of perjury, that the above is true and correct.

Dec 18, 2019

Charging Party Signature

NOTARY - When necessary for State and Local Agency Requirements

I swear or affirm that I have read the above charge and that it is true to the best of my knowledge, information and belief.

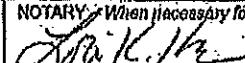
SIGNATURE OF COMPLAINANT

SUBSCRIBED AND SWORN TO BEFORE ME THIS DATE
(month, day, year)

12/18/19

EXHIBIT
A

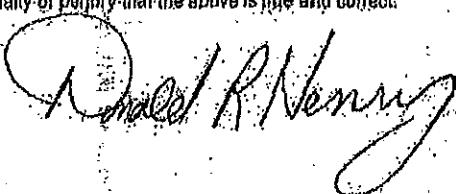
EEOC Form 6 (11/00)

AMENDED CHARGE OF DISCRIMINATION		Charge Presented To:	Agency(ies) Charge No(s):
<small>This form is affected by the Privacy Act of 1974. See enclosed Privacy Act Statement and other information before completing this form.</small>		<input checked="" type="checkbox"/> FEPAC <input checked="" type="checkbox"/> EEOC	EO-0051-A20 24D-2020-00076
City of Fort Wayne Metro Human Relations Commission			
State or local Agency, if any			
Name (Indicate Mr., Ms., Mrs.) Donald R. Henry		Home Phone (incl. Area Code) (260) 625-6152	Date of Birth [REDACTED]
Street Address 11212 Bay Pines Court, Fort Wayne, IN 46814		City, State and ZIP Code	
Named is the Employer, Labor Organization, Employment Agency, Apprenticeship Committee, or State or Local Government Agency That I Believe Discriminated Against Me or Others. (If more than two, list under PARTICULARS below.)			
Name KROGER		No. Employees, Members Unknown	Phone No. (Include Area Code) (260) 426-3453
Street Address 1126 West State Boulevard, Fort Wayne, IN 46808		City, State and ZIP Code	
Name [REDACTED]		No. Employees, Members [REDACTED]	Phone No. (Include Area Code) [REDACTED]
Street Address [REDACTED]		City, State and ZIP Code [REDACTED]	
DISCRIMINATION BASED ON (Check appropriate box(es)) <input type="checkbox"/> RACE <input type="checkbox"/> COLOR <input type="checkbox"/> SEX <input type="checkbox"/> RELIGION <input type="checkbox"/> NATIONAL ORIGIN <input checked="" type="checkbox"/> RETALIATION <input checked="" type="checkbox"/> AGE <input checked="" type="checkbox"/> DISABILITY <input type="checkbox"/> GENETIC INFORMATION <input checked="" type="checkbox"/> OTHER <small>(PMLA/Retaliation)</small>		DATE(S) DISCRIMINATION TOOK PLACE <small>Earliest</small> 05-01-2019 <small>Latest</small> 12-12-2019 <input checked="" type="checkbox"/> CONTINUING ACTION	
THE PARTICULARS ARE (If additional paper is needed, attach extra sheet(s)): <p>I am a qualified individual over the age of forty (40) who has worked for Kroger since August 2001. In May 2019, I received a "satisfactory" performance review. The review was later changed to "unsatisfactory" by the district manager, Rick Koomler ("Koomler"). I believe that Koomler changed the review because of my age, sixty four (64). In August 2019, I reported that the negative performance review was based on age discrimination. On or about December 3, 2019, I received notice that I could either be demoted and take a pay cut, or be terminated. I believe I was forced to take a demotion in retaliation to my complaint of age discrimination. For these reasons, I believe I have been discriminated against on the basis of my age, and retaliated against, in violation of the Age Discrimination in Employment Act of 1967, as amended, and Fort Wayne Ordinance G-21-78, as amended.</p>			
<small>I want this charge filed with both the EEOC and the State or local Agency, if any. I will advise the agencies if I change my address or phone number and I will cooperate fully with them in the processing of my charge in accordance with their procedures.</small>		<small>NOTARY - When necessary for State and Local Agency Requirements</small>  <small>I swear or affirm that I have read the above charge and that it is true to the best of my knowledge, information and belief.</small> <small>SIGNATURE OF COMPLAINANT</small>	
<small>I declare under penalty of perjury that the above is true and correct.</small> <u>3/23/20</u> <u>Donald R. Henry</u>		<small>SUBSCRIBED AND SWORN TO BEFORE ME THIS</small> <small>(month, day, year)</small> 3/23/2020 <div style="border: 1px solid black; padding: 5px; display: inline-block;"> JOHN RAY KOLB Seal Notary Public - State of Indiana Allen County My Commission Expires Dec 20, 2024 </div>	

EXHIBIT

B

EEOC Form 6 (11/00)

AMENDED CHARGE OF DISCRIMINATION <small>This form is affected by the Privacy Act of 1974. See enclosed Privacy Act Statement and other information before completing this form.</small>		Charge Presented To:	Agency(ies) Charge No(s):
		<input checked="" type="checkbox"/> FEPA <input checked="" type="checkbox"/> EEOC	EO-0051-A20 24D-2020-00076
City of Fort Wayne Metro Human Relations Commission <small>State or Local Agency, if any</small>		and EEOO	
<p>***This charge has been amended to include the following***</p> <p>In addition to being discriminated and retaliated against on the basis of his age and for complaining about age discrimination, Donald R. Henry ("Complainant") contends that he was discriminated against on the basis of his disability. Complainant suffers from a heart disability which triggers arrhythmia and which substantially interferes with Complainant's ability to breath, live, exercise, work long hours, and other daily life activities. Pursuant to the Americans with Disabilities Act, 42 U.S.C 12111 et seq. ("ADA") Complainant requested reasonable accommodations which have not only been denied, but Kroger ("Respondent") has retaliated against Complainant for requesting these accommodations and for engaging in the interactive process, including being placed on medical leave which Complainant did not request, and otherwise interfering with Complainant's job and not letting him come back to work. After complaining about his heart condition, the "fake" PIP, after being denied reasonable accommodations which had been previously given to Complainant for years. Complainant and Respondent successfully engaged in the interactive process in 2013 and entered into a reasonable accommodation for 7 years; in 2019 Respondent unilaterally rescinded the longstanding accommodation as part of their retaliation and refused to reinstate the accommodation when Complainant asked. Respondent failed to provide Complainant reasonable accommodations and retaliated against Complainant by making his job so hellish that Complainant would either quit or resign. However, Complainant will not resign, and to this day, Complainant is waiting for Respondent to engage in the interactive process in good faith and grant the reasonable accommodations he deserves, and to otherwise come into compliance with the ADA.</p> <p>As a result of Respondent's discrimination and retaliation against Complainant, Complainant's job had been interfered with, has experienced emotional distress, mental health anguish, loss of income, loss of job, and other damages and injuries. Respondent acted intentionally and in reckless disregard to Complainant's federally protected civil rights under the ADA and the ADEA, warranting the imposition of punitive damages. Complainant seeks compensatory damages.</p> <p>Finally, Complainant has been discriminated against because of his disability and was retaliated against on account of filing Charges of Discrimination and as a result of participating in the process about complaining about discrimination and opposing discriminatory conduct, because Complainant was terminated on or about February 12, 2020. Complainant claims that Respondent failed to engage in the interactive process and denied his request for reasonable accommodations, and punished him for engaging in conduct protected by the American's With Disabilities Act, and further fired Complainant for filing previous Charges of Discrimination. Complainant lost his job and job-related benefits including income. Complainant suffered emotional distress, mental anguish, a loss of his job, loss of income and related benefits, suffered inconvenience, and experienced other damages and injuries. Respondent fired Complainant intentionally and in reckless disregard of his rights under the ADA and the ADEA (because of his age), warranting an imposition of punitive/liquidated damages.</p> <p>For these reasons, Complainant believes he has been discriminated against on the basis of his age, on the basis of his disability, and retaliated against in violation of the Age Discrimination in Employment Act of 1967, as amended; the Americans with Disabilities Act Amendments Act of 2008, as amended; and Fort Wayne Ordinance G-21-78, as amended.</p>			
<p>I want this charge filed with both the EEOC and the State or local Agency, if any. I will advise the agencies if I change my address or phone number and I will cooperate fully with them in the processing of my charge in accordance with their procedures.</p> <p>I declare under penalty of perjury that the above is true and correct.</p> <p>3/23/20 </p>		<p>NOTARY - When necessary for State and Local Agency Requirements</p> <p><i>[Signature]</i></p> <p>I swear or affirm that I have read the above charge and that it is true to the best of my knowledge, information and belief.</p> <p>SIGNATURE OF COMPLAINANT</p>	
		<p>SUBSCRIBED AND SWORN TO BEFORE ME THIS DATE (month, day, year)</p> <p>3/23/2020</p> <p>KAY NOLB Notary Public - State of Indiana Allen County My Commission Expires Dec 20, 2024</p>	

DISMISSAL AND NOTICE OF RIGHTS

To: Donald R. Henry
11212 Bay Pines Court
Fort Wayne, IN 46814

From: Indianapolis District Office
101 West Ohio Street
Suite 1900
Indianapolis, IN 46204



*On behalf of person(s) aggrieved whose identity is
CONFIDENTIAL (29 CFR §1601.7(a))*

EEOC Charge No.

EEOC Representative

Telephone No.

24D-2020-00076

Jeremy A. Sells,
State & Local Coordinator

(463) 999-1161

THE EEOC IS CLOSING ITS FILE ON THIS CHARGE FOR THE FOLLOWING REASON:

- The facts alleged in the charge fall to state a claim under any of the statutes enforced by the EEOC.
- Your allegations did not involve a disability as defined by the Americans With Disabilities Act.
- The Respondent employs less than the required number of employees or is not otherwise covered by the statutes.
- Your charge was not timely filed with EEOC; in other words, you waited too long after the date(s) of the alleged discrimination to file your charge.
- The EEOC issues the following determination: Based upon its investigation, the EEOC is unable to conclude that the information obtained establishes violations of the statutes. This does not certify that the respondent is in compliance with the statutes. No finding is made as to any other issues that might be construed as having been raised by this charge.
- The EEOC has adopted the findings of the state or local fair employment practices agency that investigated this charge.
- Other (briefly state)

- NOTICE OF SUIT RIGHTS -

(See the additional information attached to this form.)

Title VII, the Americans with Disabilities Act, the Genetic Information Nondiscrimination Act, or the Age Discrimination in Employment Act: This will be the only notice of dismissal and of your right to sue that we will send you. You may file a lawsuit against the respondent(s) under federal law based on this charge in federal or state court. Your lawsuit must be filed WITHIN 90 DAYS of your receipt of this notice; or your right to sue based on this charge will be lost. (The time limit for filing suit based on a claim under state law may be different.)

Equal Pay Act (EPA): EPA suits must be filed in federal or state court within 2 years (3 years for willful violations) of the alleged EPA underpayment. This means that backpay due for any violations that occurred more than 2 years (3 years) before you file suit may not be collectible.

On behalf of the Commission

October 2, 2020

Enclosures(s)

Michelle Eisele,
District Director

(Date Mailed)

cc: HR Director
KROGER
1125 West State Boulevard
Fort Wayne, IN 46808

Christopher Myers
CHRISTOPHER C. MYERS AND ASSOCIATES
809 S Calhoun Street, Suite 400
Fort Wayne, IN 46802